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Case No._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

TED ENGLE, Superintendent
Chillicothe Correctional Institute

Petitioner,

vs.

JAMES SAMUEL SIMS.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY AS ENUNCIATED IN *BREED V. JONES*, 421 U.S. 519 (1975) MAY BE PRESUMED IN THE ABSENCE OF ANY DEMONSTRATION BY A FEDERAL HABEAS CORPUS APPLICANT THAT THE STATE COURT JUVENILE PROCEEDINGS WHICH RESULTED IN A TRANSFER OF JURISDICTION TO AN ADULT COURT WERE ADJUDICATORY IN NATURE.

PARTIES

The petitioner in this action is Ted Engle in his capacity as the Superintendent of the Chillicothe Correctional Institute at Chillicothe, Ohio. The respondent is James Samuel Sims.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit and order denying rehearing are reported as *Sims v. Engle*, 619 F. 2d 598 (6th Cir. 1980) (A- 2 , A- 15). The decision of the United States District Court for the Northern District of Ohio, Eastern Division is unreported. (A- 16). The decision of the Ohio Court of Appeals for the Eighth Judicial District is reported as *State v. Sims*, 55 Ohio App. 2d 285 (1977) (A- 30).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on April 17, 1980. Rehearing was denied on June 26, 1980. Jurisdiction is conferred by 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment V to the Constitution prohibiting double jeopardy

> . . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . .

made applicable to the states by Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Case No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

TED ENGLE, Superintendent
Chillicothe Correctional Institute

Petitioner,

vs.

JAMES SAMUEL SIMS,

Respondent.

STATEMENT OF THE CASE

On February 27, 1962, the Juvenile Division of the Cuyahoga County, Ohio, Court of Common Pleas (Juvenile Court) issued a citation and warrant against respondent James Samuel Sims. The citation and warrant alleged that respondent had participated in several armed robberies, one of which culminated in the murder of one William C. Beasley. Respondent, who was seventeen (17) years of age at the time, was taken into custody and brought before the Juvenile Court on March 27, 1962 for a hearing. The Juvenile Court determined to bind the respondent over to the Cuyahoga County Court of Common Pleas for trial as an adult. No transcript or stenographic record of the March 27, 1962 hearing was made. The sole documentation of the proceeding is the following decision of the presiding judge which was entered on the Juvenile Court docket:

TO COURT: This twenty-seventh day of March, 1962, James Samuel Sims, a minor of about the age of seventeen years, came before the Honorable Albert A. Woldman upon the petition of Charles R. Reynolds alleging that James Samuel Sims is a delinquent child in this: that on or about February 16, 1962, at 4502 St. Clair Avenue, Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon to wit, a pistol, rob from the person of one, Dorothy Kulas, cash in the approximate amount of $1,069.00, contrary to the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 18, 1962, at 3005 Woodhill Road, Cleveland, Ohio, he did unlawfully, purposely and while in the perpetration of a robbery, kill one, William C. Beasley, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 23, 1962, at 6938 Kinsman Road, Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon, to wit, a pistol, rob from the person of one, David Warren, cash in the approximate amount of $104.50, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. It appearing to the Court that said child has committed acts which, if committed by an adult, would be felonies, a mental and physical examination having been made by duly qualified persons as provided by statute, it is hereby ordered that pursuant to Section 2151.26 Ohio Revised Code the said James Samuel Sims be bound over to the Court of Common Pleas of

> Cuyahoga County for further proceedings according to law. It is ordered that said James Samuel Sims be, and he hereby is, committed to the Jail of Cuyahoga County.

Subsequent to the bindover, the Cuyahoga County Grand Jury indicted respondent on two (2) counts of first degree murder. Respondent pled not guilty to these charges, but later withdrew this plea and entered a plea of guilty to homicide generally, which was accepted, and waived a trial by jury. According to then current Ohio law, respondent was tried before a three (3) judge panel solely on the issue of the degree of culpability. Respondent was found guilty of first degree murder on both counts of the indictment, the Court recommending mercy, and was sentenced to two consecutive terms of life imprisonment. The Court rejected respondent's motions for reconsideration of the sentence and to vacate and set aside the judgment.

Some fourteen (14) years after his murder convictions, respondent filed a belated *pro se* motion for leave to appeal and a motion to proceed *in forma pauperis* with the Ohio Court of Appeals for the Eighth Judicial District. The Court of Appeals granted both motions on June 9, 1976 and appointed counsel for respondent. In appealing his 1962 convictions, respondent assigned two errors. First, respondent alleged that the trial and conviction before the Court of Common Pleas subsequent to the hearing and order of the Juvenile Court put him in double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Second, respondent asserted that the trial court had failed to determine whether respondent had knowingly, intelligently and voluntarily entered his guilty plea. Regarding respondent's double jeopardy claim, the state appellate court found that the March 27, 1962 Juvenile Court hearing was limited to a determination of probable

cause and therefore consistant with this Court's decision in *Breed v. Jones*, 421 U.S. 519 (1975). The Court of Appeals found no error and affirmed respondent's convictions and sentence. *State v. Sims*, 55 Ohio App. 2d 285, 9 Ohio Op. 3d 417 (Ct. App. 1977). (A- 30). Upon further appeal, the Supreme Court of Ohio dismissed the appeal on April 7, 1978 for failure to state a substantial constitutional question. *State v. Sims*, Case No. 78-140 (Supreme Court of Ohio, 1978).

Respondent thereafter filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Northern District of Ohio, Eastern Division. The district court rejected respondent's double jeopardy contention by holding that respondent had failed to demonstrate that the hearing conducted before the Juvenile Court was adjudicatory in nature so as to result in the attachment of jeopardy. (A- 16). Respondent filed a notice of appeal and was granted a certificate of probable cause.

The United States Court of Appeals for the Sixth Circuit reversed the lower court judgment and remanded to the district court for issuance of the writ of habeas corpus. *Sims v. Engle*, 619 F. 2d 598 (6th Cir. 1980) (A- 2). The Court of Appeals held that as the Ohio bind over statute pursuant to which the transfer proceeding was conducted did not expressly limit the Juvenile Court hearing to a probable cause determination, "what actually occured at the March 27, 1962 hearing [was] insignificant," and it would be *presumed* that jeopardy attached.

Petitioner thereafter filed a petition for rehearing but the Court of Appeals issued an order denying said petition. (A- 15). This petition has followed.

Petitioner's motion to stay the mandate was denied by the Court of Appeals on July 2, 1980. Accordingly, respondent was released from petitioner's custody July 14, 1980.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The instant case presents an important issue of constitutional law regarding the allocation of the burden of proof in a federal habeas corpus proceeding brought pursuant to 28 U.S.C. Section 2254.

In *Breed v. Jones,* 421 U.S. 519 (1975), this Court held that the Double Jeopardy Clause of the Fifth Amendment, as made applicable to the states through the Fourteenth Amendment, precluded a trial in a court of general adult jurisdiction where the minor had earlier been found delinquent in an adjudicatory proceeding before a Juvenile court. However, this Court went on to state:

> We note that nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding. *See Collins v. Loisel,* 262 U.S. 426, 429, 67 L Ed 1062, 43 S Ct 618 (1923); *Serfass v. United States,* 420 U.S. 377, 391-392, 43 L Ed 2d 265, 95 S Ct 1055 (1975). The instant case is not one in which the judicial determination was simply a finding of, e.g., probable cause. Rather, it was an adjudication that respondent had violated a criminal statute. *Id.* at page 538 n. 18.

There exists no dispute that respondent was found guilty of two (2) counts of first degree murder by the Court of Common Pleas of Cuyahoga County after having been bound over for trial as a adult subsequent to a hearing before the Juvenile Court. The central focus of respondent's claim is thus an inquiry as to the *nature* of the March 27, 1962

Juvenile Court hearing.

Some fourteen (14) years after his homicide convictions, respondent was granted leave by the Ohio Court of Appeals for the Eighth Judicial District to perfect a delayed appeal. After noting that the court docket was the only available record of the Juvenile Court proceedings and reproducing that record in full, the state appellate court rejected respondent's claim that the March 27, 1962 hearing constituted an initial jeopardy by stating:

> This docket demonstrates that the appellant came before the Juvenile Court upon a petition alleging that the appellant was delinquent, and further alleging the particulars of the charges filed against him. The court determined that there was an appearance of acts which would have been felonies if committed by an adult, and in accordance with the provisions of R.C. 2151.26, bound the appellant over to the Court of Common Pleas for further proceedings, committing the appellant to jail.
>
> There is nowhere any indication that an "adjudicatory hearing or a jurisdictional hearing" was conducted on this occasion. There is no finding of delinquency, and there is no recitation of any evidence upon which such an adjudication could be premised. All that appears to have occurred is that the Juvenile Court arrived at a determination that there was an appearance of possible criminal action which properly and appropriately should be considered by the Court of Common Pleas of Cuyahoga County.

* * * *

> Although our contemporary terminology or "probable cause" is not recited in the transcript of this proceeding, it is clear from the context that the court determined this probability, at the proceedings of March 27, 1962.
>
> * * * *
>
> In the absence of any indication to the contrary, the proceedings of a court are presumed to be valid and regular. *State v. Ray* (1956), 102 Ohio App. 395. The Juvenile Court did nothing to place the appellant in any measure of jeopardy by reason of its conduct in this case. For this reason, we reject the first assignment of error.

State v. Sims, 55 Ohio App. 2d 285, 290-291 (1977).

The state appellate court thus held that respondent had failed to demonstrate, and indeed the available record of proceedings refuted, any contention that the hearing before the Juvenile Court was adjudicatory in nature.

Respondent thereafter filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Ohio, Eastern Division. After reviewing the record, the district court held that respondent had failed to establish any claim of double jeopardy by stating in pertinent part that:

> Review of the journal entry lends little support to petitioner's contention that the juvenile proceeding at issue was of an adjudicatory character. Absent from the entry is any specific finding that petitioner did in fact commit any of the criminal acts alleged in the juvenile proceeding. Similarly, there is lacking any recitation of evidence upon which an

> adjudication could be fairly based. The presiding judge made no specific factual findings, but merely indicated that it *appeared* to the court that petitioner had committed felonious acts. This language, coupled with the absence of any express findings, indicates that the juvenile hearing afforded petitioner was not adjudicatory in nature, but was rather similar to a probable cause determination. Given that the burden generally rests on the petitioner in habeas corpus proceedings, *Swain v. Alabama,* 380 U.S. 202 (1965) this Court cannot conclude from the face of the journal entry that petitioner was subjected to an adjudicatory hearing upon which jeopardy would attach under the principles of *Breed v. Jones, supra.*
>
> * * * *
>
> This Court concludes then that petitioner has failed to sustain his burden of establishing that the juvenile proceeding afforded him was of an adjudicatory nature such that jeopardy would attach. Accordingly, no violation of *Breed v. Jones, supra,* has been demonstrated, and petitioner's first ground for habeas corpus relief must be rejected. (A- 21 , A- 23).

Respondent subsequently filed a notice of appeal and was granted a certificate of probable cause by the district court.

The United States Court of Appeals for the Sixth Circuit reversed the district court judgment. The federal appellate court held that the district court erred in examining the record of Juvenile Court proceedings in order to ascertain

whether the hearing before that court resulted in a determination of delinquency or was otherwise adjudicatory in nature. Indeed, the appellate court went so far as to state that, "[w]hat actually occurred at the March 27, 1962 hearing is. . .insignificant." Rather, the appellate court held that, as the bind over hearing was ". . .not limited in scope *by statute* to a preliminary or probable cause hearing, jeopardy attached. . ." [emphasis added]. The federal appellate court thus held that even though the March 27, 1962 Juvenile Court hearing was actually limited to an inquiry as to whether there existed probable cause to believe that respondent had committed the murder and robberies charged, jeopardy attached due to the fact that the Juvenile Court was not *statutorily* limited to such preliminary hearing or probable cause type inquiry.

Petitioner thereafter filed a timely petition for rehearing with the Court of Appeals. Petitioner argued that the far reaching language of the opinion would result in the release of all juvenile felons bound over for trial as adults prior to amendment of former Ohio Revised Code Section 2151.26. Petitioner further asserted that while said statute was interpreted to require a pre-bind over delinquency adjudication some eight (8) years *after* respondent's Juvenile Court hearing [*In re Jackson,* 21 Ohio St. 2d 215 (1970)], there did not exist, at the time of respondent's hearing, any unified practice among Ohio Juvenile Court judges. In support of this position, petitioner referred the Court of Appeals to the opinion of Judge Young in *Brenson v. Havener,* 403 F. Supp. 221 (N.D. Ohio 1975). Prior to his appointment to the federal bench, Judge Young was an Ohio Juvenile Court judge and one of the pre-eminent authorities on Ohio juvenile law. Speaking of the practice of Ohio Juvenile Court judges during the time frame herein pertinent, Judge Young stated:

> The question of whether the double jeopardy clause was applicable to juvenile proceedings has been argued and debated for years. The author of this opinion was for many years an Ohio Juvenile Court Judge and has continually argued to the other judges of that court and to committees of the Ohio General Assembly that it did apply and has made this argument known throughout the State of Ohio. Many other Ohio Juvenile Court judges shared his views.
>
> * * *
>
> The Ohio Statutes and Juvenile Rule did not mandate adjudication of delinquency before bindover, and many juvenile court judges bound over before commencing an adjudicatory hearing. *Id.* at page 225.

Petitioner asserted that, given the fact that many Ohio Juvenile Court judges anticipated the double jeopardy ramifications of a delinquency adjudication prior to bind over, it was plain error to simply *presume* that the Juvenile Court transfer hearing conducted in respondent's case violated the proscriptions enunciated in *Breed v. Jones, supra.* The Ohio Court of Appeals which decided *State v. Sims, supra* was clearly cognizant of the customary bind over procedures of its lower Juvenile Courts at the time of respondent's transfer hearing and, upon examination of the Juvenile Court record, held that the hearing conducted in respondent's case was limited to a probable cause determination. Petitioner finally noted that respondent had not requested an opportunity to prove that the March 27, 1962 Juvenile Court hearing was adjudicatory in nature and

that any arguable disagreement which the federal appellate court entertained with respect to the state court rulings should, at most, result in a remand to the district court with instructions to conduct an evidentiary hearing wherein respondent would be afforded the opportunity to establish his claim of double jeopardy.

The federal appellate court thereafter issued an order denying the petition for rehearing. Therein, the Court stated in pertinent part that, "[o]ur opinion does not decide that there is a violation of double jeopardy, if the record of the juvenile court hearing plainly establishes that the hearing was limited to a determination of probable cause. . ." The Court did not remand the case to the district court with instructions to conduct an evidentiary hearing but, rather, reaffirmed the earlier judgment that the writ of habeas corpus should issue.

It is well established that a federal habeas corpus applicant in a proceeding brought pursuant to 28 U.S.C. Section 2254 must allege and prove the deprivation of a federally secured right prior to the issuance of a writ of habeas corpus. *Swain v. Alabama,* 380 U.S. 202 (1965). The failure of a state court inmate to establish the denial of a constitutional right during the course of the state court proceedings must result in dismissal of the habeas corpus action and it is plain error for a federal court to simply *presume* the violation of such right. *Rose v. Mitchell,* 443 U.S. 545 (1979); *Murphy v. Florida,* 421 U.S. 794 (1975).

In the instant case, the state appellate court determined that the March 27, 1962 hearing conducted before the Juvenile Court was limited to a probable cause determination as expressly sanctioned by this Court in *Breed v. Jones, supra.* Respondent having made no contrary offer of proof in his federal habeas corpus proceeding, the district court properly dismissed his claim for failure to establish a violation of double jeopardy principles.

The salient effect of the federal appellate court opinion and order denying rehearing is to invert the burden of proof in a 28 U.S.C. Section 2254, proceeding, i.e., the Court below established a rule whereby the deprivation of a federally guaranteed right is simply *presumed*. The egregious nature of the federal appellate court ruling is amplified exponentially by the Court's failure to remand the case to the district court for an evidentiary hearing in order to alleviate any perceived or subjective reservations the Court might have entertained as to the scope of the Juvenile Court hearing.

A federal writ of habeas corpus extends to one deprived of his liberty in violation of the United States Constitution. However, it remains incumbent upon the applicant to allege and establish such unconstitutional confinement. Here, the record is utterly devoid of any evidence that the transfer hearing placed respondent in jeopardy. The federal appellate court absolved respondent of any need to establish his claim by means of a presumption which is authorized by neither 28 U.S.C. Section 2254 itself nor by the prior opinions of this Court. As the instant case presents a substantial constitutional question as to the proper procedure regarding operation of the federal writ of habeas corpus, certiorari should be granted in order to resolve this issue of national importance.

Respectfully submitted,

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ATTORNEYS FOR
PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition For Writ Of Certiorari have been served on respondent James Samuel Sims, by forwarding such copies through the office of his counsel, Michael C. Hennenberg, 901 Bond Court Building, Cleveland, Ohio 44114, by United States mail, postpaid, this day of , 1980. I further certify that all parties required to be served have been so served.

RICHARD DAVID DRAKE
Assistant Attorney General

APPENDIX

Page

Opinion, April 17, 1980, United States Court of Appeals for the Sixth Circuit, *Sims v. Engle*, 619 F. 2d 598 (6th Cir. 1980) reversing district court A-2

Order, June 26, 1980, United States Court of Appeals for the Sixth Circuit, denying petition for rehearing A-15

Memorandum and Order, March 6, 1979, United States District Court for the Northern District of Ohio, Eastern Division, dismissing petition for writ of habeas corpus A-16

Opinion, *State v. Sims*, 55 Ohio App. 2d 285 (1977) A-30

No. 79-3264

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES SAMUEL SIMS,
Petitioner-Appellant,

v.

TED ENGLE, Superintendent,
Respondent-Appellee.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed April 17, 1980.

Before: ENGEL, MARTIN and JONES, Circuit Judges.

JONES, Circuit Judge. This case is an appeal from a denial of a writ of habeas corpus. We reverse the order of the district court and remand for issuance of the writ.

On February 27, 1962, the Juvenile Division of the Cuyahoga County Court of Common Pleas in the State of Ohio (Juvenile Court) issued a citation and warrant against appellant. The citation and warrant alleged that appellant had participated in several armed robberies. Appellant, who was seventeen years old at that time, was taken into custody and brought before the Juvenile Court on March 27, 1962 for a hearing. No transcript or record of the hearing was made. The Juvenile Court determined in accordance with the existing provisions of Section 2151.26 of the Ohio Revised Code[1] to bind the appellant over to the Cuyahoga County

[1] A delinquent was defined, in pertinent part, as "any child who violates any law of this state . . ." Rev. Code Section 2151.02(a) (1957).

Court of Common Pleas Criminal Division for trial as an adult. The Juvenile Court entered its decision on the docket as a journal entry, which read:

> TO COURT: This twenty-seventy day of March, 1962, James Samuel Sims, a minor of about the age of seventeen years, came before the Honorable Albert A. Woldman upon the petition of Charles R. Reynolds alleging that James Samuel Sims is a delinquent child in this: that on or about February 16, 1962, at 4502 St. Clair Avenue, Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon to wit, a pistol, rob from the person of one, Dorothy Kulas, cash in the approximate amount of $1069.00, contrary to the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 18, 1962, at 3005 Woodhill Road, Cleveland, Ohio, he did unlawfully, purposely and while in the perpetration of a robbery, kill one, William C. Beasley, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 23, 1962, at 6938 Kinsman Road, Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon, to wit, a pistol, rob from the person of one, David Warren, cash in the approximate amount of $104.50, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. It appearing to the Court that said child has committed acts which, if committed by an adult, would be felonies, a mental and physical examination having been made by duly qualified persons as provided by statute, it is hereby ordered that pursuant to Section 2151.26 Ohio Revised Code the said James Samuel Sims be bound

> over to the Court of Common Pleas of Cuyahoga County for further proceedings according to law. It is ordered that said James Samuel Sims be, and he hereby is, committed to the Jail of Cuyahoga County.

Following the bindover, the Cuyahoga County Grand Jury indicted appellant on two counts of first degree murder. Appellant pled not guilty to these charges, but later withdrew this plea and entered a plea of guilty to homicide generally, which was accepted, and waived a trial by jury. According to then current Ohio law, appellant was tried before a three judge court solely on the issue of the degree of culpability. Ohio Rev. Code Section 2945.06. Appellant was found guilty of first degree murder on both counts of the indictment and was sentenced to two consecutive terms of life imprisonment. The court rejected appellant's motions for reconsideration of the sentence and to vacate and set aside the judgment.

On May 17, 1976, appellant filed a very belated *pro se* motion for leave to appeal and a motion to proceed *in forma pauperis* with the Ohio Eighth District Court of Appeals. The Court of Appeals granted both motions on June 9, 1976 and appointed counsel for appellant. In appealing his 1962 conviction, appellant assigned two errors. First, appellant alleged that the trial and conviction before the Court of Common Pleas Criminal Division subsequent to the hearing and order of the Juvenile Court put him in double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Second, appellant asserted that the trial court had failed to determine whether appellant had knowingly, intelligently and voluntarily entered his guilty plea. The Court of Appeals found no error and affirmed appellant's conviction and sentence. *State v. Sims*, 55 Ohio App. 2d 285, 9 Ohio Op. 3d 417 (Ct. App. 1977). Upon further appeal, the Supreme Court of Ohio dismissed the appeal on April 7, 1978 for failure to state a substantial

constitutional question. *State v. Sims*, Case No. 78-140 (Supreme Court of Ohio, 1978).

Winning no relief in the state courts, appellant petitioned for a writ of habeas corpus in the Northern District of Ohio on the same two grounds asserted in state court. The district court found no merit in either argument advanced by appellant and denied the writ. Appellant then filed a timely appeal with this court. Because we have determined that appellant was subjected to double jeopardy in the state court proceedings and is therefore entitled to the writ of habeas corpus, we do not address the issue of the voluntariness of the guilty plea.

While juvenile court practices may now be scrutinized for compliance with constitutional standards, it was not always so. *Kent v. United States*, 383 U.S. 541 (1966), provides insight into the basis of the Supreme Court's discomfort with the prior lack of scrutiny. The Court posed the problem in these words:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.

383 U.S. at 555-56.

The Supreme Court resisted the temptation to pass on the precise question at that time. Yet in the following year, it squarely confronted and decided the issue in *In re Gault*, 387 U.S. 1 (1967).

In holding in *In re Gault* that constitutional guarantees must be accorded juveniles, the Supreme Court declared: "...

neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," 387 U.S. at 538, and, ". . .it would be extraordinary if our Constitution did not require the procedural regularity and exercise of care implied in the phrase, 'due process' . . ." 387 U.S. at 546.

These holdings in *Kent* and *Gault*, along with *In re Winship*, 397 U.S. 358 (1970), decided several years later, provide the sturdy decisional underpinning for *Breed v. Jones*, 421 U.S. 519 (1975), and our holding in this case.

The double jeopardy clause of the Fifth Amendment applies to state court proceedings through the force of the due process clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). The double jeopardy clause has been held specifically applicable to state juvenile court proceedings, *Breed v. Jones*, 421 U.S. 519 (1975), and applies retroactively to proceedings conducted before 1975. *Holt v. Black*, 550 F. 2d 1061 (6th Cir. 1977). The constitutional principles governing this case and the facts of the case are undisputed. At issue is the application of the constitutional principles to the set of facts presented. Because a question of law is presented, our scope of review is free from the clearly erroneous standard.

The crux of this case is whether appellant was placed in jeopardy at the March 27, 1962 hearing in the Juvenile Court. It is firmly established that jeopardy attaches "when the Juvenile Court, as the trier of the facts began to hear evidence." *Breed v. Jones*, 421 U.S. at 531.[2] We now

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[2]The Supreme Court also stated:

We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. 421 U.S. at 529.

determine that the Juvenile Court was acting as the trier of facts at the March 27, 1962 hearing. *Breed v. Jones* is indistinguishable in all significant respects from the facts in the case at bar and compels our conclusion that appellant's constitutional right against double jeopardy was violated.

In *Breed v. Jones,* a petition was filed in the Superior Court of California, alleging that Jones, a seventeen year old male, was a delinquent under the provisions of Cal. Welf. & Inst'ns Code Section 602 (1966), in that he had committed acts, which if committed by an adult, would constitute the crime of armed robbery. After a detention hearing, at which the probation officer was required to present only a prima facie case that Jones had committed the alleged offense, Jones was ordered detained pending a hearing on the petition. Several weeks later the Juvenile Court conducted the adjudicatory hearing pursuant to Cal. Welf. & Inst'ns Code Section 701 (1966).[3] The Juvenile Court in the Section 701 hearing addressed only the question of whether Jones was a delinquent within the meaning of Section 602. The Juvenile Court heard testimony and found that the allegations in the petition were true and that Jones was a delinquent as defined by Section 602. The Juvenile Court

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[3]At the time of the hearing, Cal. Welf. & Inst'ns Code §701 (1966) provided:

At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, *a preponderance of evidence,* legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Sections 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not representd by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made. (Evidence added.)

then ordered Jones detained until the dispositional hearing required by Cal. Welf & Inst'ns Code Section 702 (Supp. 1968). At the dispositional hearing, the Juvenile Court found Jones unfit for rehabilitation through the facilities of the Juvenile Court and ordered Jones prosecuted as an adult. Cal. Welf. & Inst'ns Code Section 707 (Supp. 1967).[4]

Determining that jeopardy had attached at the point in time of the Section 701 hearing, at which the Juvenile Court made a finding that Jones had committed the alleged offenses, the United States Supreme Court held that the subsequent prosecution of Jones as an adult violated the double jeopardy clause. 421 U.S. at 531.

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[4]At the time, Cal. Welf. & Inst'ns Code §707 (Supp. 1967) provided:

At the time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefore by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Secion 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

A denial by the person on whose behalf the petitioner is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness.

The Ohio Juvenile Code in 1962[5] was strikingly similar to the California juvenile law under examination in *Breed v. Jones,* though the procedure in Ohio juvenile courts was marked by greater informality. The Juvenile Court, possessing exclusive jurisdiction in any matter "concerning any child who is a . . .delinquent. . ."(Ohio Rev. Code Section 2151.23), would issue a citation (Ohio Rev. Code Section 2151.28) or a warrant (Ohio Rev. Code Section 2151.30) to assume custody over a child. The Juvenile Court could then order the child released in the custody of parents or other responsible persons or detained in a detention center, as was appellant. Ohio Rev. Code Section 2151.31. The Juvenile Court next conducted a hearing in an informal manner (Ohio Rev. Code 2151.35),[6] at which the child could be represented by counsel and could present evidence in his behalf. The rules

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[5]All citations to the Ohio Revised Code indicate the statute as it read in 1962.

[6]**Informal hearing; right of child to counsel; disposition; school district to bear cost.**

Sec. 2151.35. The juvenile court may conduct its hearings in an informal manner, and may adjourn such hearings from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case. The juvenile court shall permit a child to be represented by an attorney-at-law during any hearing before such court and shall extend to such child all the rights and privileges of section 2935.17 of the Revised Code. Such attorney-at-law, the parents or guardian of such child and any attorney-at-law representing them shall be entitled to visit such child at any reasonable time and to be present at any hearing involving the child and shall be given reasonable notice of such hearing.

Any report or part thereof concerning such child which has been prepared by an employee of the court which is used in the hearing and is pertinent thereto shall for good cause shown be made available to any attorney-at-law representing such child and to any attorney-at-law representing the parents or guardian of such child, upon written request prior to any hearing involving such child. All cases involving children shall be heard separaely and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving neglected, dependent, or crippled children. The court shall hear and determine all cases of children without a jury. If the court finds that the child is a juvenile traffic offender or is delinquent, neglected, or dependent, it may by order entered proceed as follows:

of civil procedure and evidence were ordinarily followed. *State v. Shardell,* 107 Ohio App. 338, 153 N.E. 2d 510 (1958). To maintain its jurisdiction and to enter a dispositional order, the Juvenile Court was required to make a finding of

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(A) Place the child on probation, under supervision in its own home, in the custody of a relative, in an institution, or in a certified foster home, wherever situate, upon such terms as the court shall determine; provided that the court may place delinquent children on a free or wage basis in uncertified foster homes. The court shall, at the time of placing the child, determine which school district must bear the cost of educating the child while he is residing at such place as the court directs. The decision of the court concerning the expense of the child's education shall be made a part of the order provided by this section;

(B) Commit the child temporarily or permanently to the division of social administration of the department of public welfare, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organiztion, or to any institution, or to any agency in Ohio or in another state authorized and qualified to provide or secure the care, treatment, or placement required in the particular case;

(C) Impose a fine upon a juvenile traffic offender or a delinquent child not exceeding * * *fifty dollars * * *and costs * * *;

(D) Make such further disposition as the court deems * * *proper;

(E) Commit a male child over sixteen years of age who has committed an act which if committed by an adult would be a felony to the Ohio state reformatory;

(F) Suspend or revoke the operator's or chauffeur's license issued to any minor found to be a juvenile traffic offender.

(G) Suspend or revoke the registration of all motor vehicles registered in the name of any minor found to be a juvenile traffic offender.

Whenever a child commits an act of delinquency before arriving at the age of eighteen years, and the specific complaint thereon is not filed or hearing held until after said child arrives at the age of eighteen years; the court shall have jurisdiction to hear and dispose of such complaint, as if the complaint were filed and hearing held before such child arrived at the age of eighteen years, provided that no child over eighteen years of age at the time of the court hearing may be committed to the boys' or girls' industrial schools.

The judgment rendered by the court under this section shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a criminal by reason of such adjudication, nor shall any child be charged or convicted of a crime in any court, except as provided in section 2151.26 of the Revised Code. The disposition of a child under the judgment rendered or any evidence given in the court shall not be admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation.

delinquency,[7] supported by the preponderance of the evidence.[8] *Id.* At the hearing the Juvenile Court judge had full authority to commit the child to the Ohio State Reformatory or Boys Industrial School, to place the child with a suitable family, to put the child on probation, or to transfer the child to the Court of Common Pleas Criminal Division for prosecution as an adult. Ohio Rev. Code Section 2151.35. The Juvenile Court possessed full and exclusive jurisdiction and power over the child until the entry of a transfer or bindover order. Ohio Rev. Code Sections 2151.53, 2151.26, 2151.38. Before entering an order to transfer, the Juvenile Court was required by statute to make a finding of delinquency, that is, that the child had committed the alleged offenses, based on a full investigation of the facts. Ohio Rev. Code Section 2151.26;[9] *In re Jackson,* 21 Ohio St. 2d 215 (1970).

Such disposition or evidence shall not operate to disqualify a child in any future civil servic examination, appointment, or application.

Whenever * * *a court commits a child to the division of social administration, the department of public welfare, or to any department, board, institution, or agency it shall transmit with the order of commitment an adequate case history of the child and its family.

With respect to a crippled or otherwise physically handicapped child who is neither delinquent, neglected, nor dependent, the court may commit the child temporarily to the division or to any agency in Ohio authorized and qualified to provide or secure the care, treatment, or placement required in the particular case.

[7]A delinquent was defined in pertinent part, as "any child who violates any law of this state. . ." Revised Code Section 2151.02(a) (1957).

[8]*In re Winship,* 397 U.S. 358 (1970), requiring the juvenile courts to use the beyond a reasonable doubt standard, had not yet been decided at the time of appellant's hearing before the juvenile court. Much of the Ohio juvenile code was rewritten subsequent to the Supreme Court decision applying due process principles to juvenile court proceedings. *In re Gault,* 387 U.S. 1 (1967); *Kent v. United States,* 383 U.S. 541 (1966).

[9]Child charged with felony.

In any case involving a delinquent child under sections 2151.01 to 2151.54,

In the case at bar, appellant was brought before the Juvenile Court for a hearing. The Juvenile Court judge at the conclusion of the hearing bound appellant over to the Court of Common Pleas Criminal Division for prosecution as an adult. Appellant was prosecuted as an adult for the same acts which were the basis of the delinquency hearing. Because the Ohio statute required a full investigation of the facts underlying the charge of delinquency and a finding of delinquency that appellant had committed acts in violation of state law, the Juvenile Court possessed the power of, and acted as, a trier of fact as defined in *Breed v. Jones*. Therefore, jeopardy attached at the March 27, 1962 hearing and the subsequent criminal prosecution for the same acts contravened appellant's constitutional protection against double jeopardy.

The district court reached its erroneous conclusion by focusing on the end product of the Juvenile Court proceeding, the journal entry, rather than the statutory powers of the Juvenile Court at the March 27, 1962 hearing. The district court found the journal entry inconclusive and determined that the journal entry gave no indication of an adjudicatory hearing or finding of delinquency. Citing to dicta in *Benson v. Havener*, 403 F. Supp. 221 (N.D. Ohio 1975), the district court stated that some juvenile judges did not follow the required statutory practice of determining delinquency before a bindover order and then held that it

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inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the Bureau of Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case.

would not assume the juvenile judge in this case followed the statutory procedure.[10]

The district court's reasoning overlooks the essential factors that the juvenile judge was empowered to impose sanctions at the March 27, 1962 hearing, that evidence was taken,[11] and that the liberty and reputation of the appellant were put in risk at that time. *Breed v. Jones,* 421 U.S. at 531-32. *See also Swisher v. Brady,* 438 U.S. 204 (1978). The rendering of a final judgment is immaterial to the applicability of the double jeopardy clause. *Swisher v. Brady,* 438 U.S. at 214-15. Accordingly, the much disputed meaning of the Juvenile Court's journal entry is irrelevant and unnecessary to the disposition of this case.[12] What actually occurred at the March 27, 1962 hearing is also insignificant. Once the Juvenile Court, possessing the jurisdiction and power to enter final orders levying a wide

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[10]The district court took no evidence on the existence of a customary practice in the Cuyahoga County Juvenile Court divergent from the statutory requirements. The statutory provisions are straightforward and the requirement made clear by the *Jackson* decision was known before 1962. *State v. Worden,* 162 Ohio St. 593 (1955) (dissenting opinion, dissenting on other grounds). Furthermore, state court proceedings are presumed to be regular and valid, *State v. Ray,* 102 Ohio App. 395, 397 (Ct. App. 1956), and orders of the state courts are to be so interpreted if it is reasonable to do so. *State v. Carter,* 27 Ohio St. 2d 135 (1971) (per curiam).

[11]That evidence was heard is indicated by the journal entry's phrase: "it appearing to the Court."

[12]Our holding makes it unnecessary to determine whether the Juvenile Court actually made a finding of fact that Sims had committed the criminal acts charged. Were we compelled to interpret the Juvenile Court's journal entry order, in particular the phrase "It appearing to the Court that said child has committed acts," we would hold that the Juvenile Court did make a finding of fact of Sims' guilt. Though we would be very reluctant to overturn the interpretations of the journal entry made by the Ohio Court of Appeals and federal district court, we are not bound by their conclusions of ultimate fact where the basic evidentiary facts are undisputed. *Industrial Equip. Co. v. Emerson Elec. Co.,* 554 F. 2d 276, 284 (6th Cir. 1977).

range of possible sanctions, began a hearing, not limited in scope by statute to a preliminary or probable cause hearing, jeopardy attached and appellant possessed the constitutional right to have the Juvenile Court, as the original trier of fact, determine his fate. *Swisher v. Brady,* 438 U.S. at 214-15; *Breed v. Jones,* 421 U.S. at 528-31. *Accord State v. Eppinger,* Case No. 35489 (Ct. App., July 14, 1977). *Compare Hall v. McKenzie,* 575 F. 2d 481 (4th Cir. 1978), and *McGaha v. Tennessee,* 461 F. Supp. 360 (E.D. Tenn. 1978) (jurisdiction of juvenile court strictly limited by statute so jeopardy did not attach).

Invocation in this situation of the double jeopardy clause fosters several of its salutary constitutional purposes. First, the juvenile would be saved the embarrassment, expense and ordeal resulting from two trials. Second, the prosecution would be prevented from refining its case in Juvenile Court for presentation in the Court of Common Pleas Criminal Division, a practice which would enhance the risk of an innocent defendant being found guilty. Finally, the prosecutor would not be allowed to shop for sentences by bringing successive prosecutions for the same offense before different courts.

IT IS THEREFORE ORDERED that the order of the district court is reversed and that the case is remanded to the district court for issuance of the writ of habeas corpus.

NO. 79-3264

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES SAMUEL SIMS,
Petitioner-Appellant,
v.

TED ENGLE, Superintendent,
Respondent-Appellee.

ORDER

Filed June 26, 1980
John P. Hehman, Clerk

BEFORE: ENGEL, MARTIN AND JONES, Circuit Judges.

Respondent-appellee Ted Engle has filed a petition for rehearing, arguing that the opinion of this Court would require the release of every juvenile who was bound over according to the procedures of former Ohio Rev. Code §2151.26. Respondent's argument overstates the holding of the opinion. Our opinion does not decide that there is a violation of double jeopardy, if the record of the juvenile court hearing plainly establishes that the hearing was limited to a determination of probable cause, after which the juvenile was ordered to stand trial as an adult in the Court of Common Pleas. Therefore, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

CIVIL ACTION NO. C78-1302

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES SAMUEL SIMS,

Petitioner

v.

TED ENGLE, et al.,

Respondents

MEMORANDUM AND ORDER

Filed March 6, 1979

KRUPANSKY, J.

This is a proceeding upon a Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. §2254. The Court, in its Order of October 17, 1978, granted Petitioner's Application to Proceed in Forma Pauperis and directed Respondent to show cause why a Writ of Habeas Corpus should not issue.

This case originated in the Juvenile Court of Cuyahoga County as Case No. 199-928, on February 27, 1962. On that date a citation and warrant were issued against the petitioner, James S. Sims (petitioner), stemming from his alleged participation in several armed robberies, one of which resulted in the death of one William C. Beasley. On March 27, 1962, a hearing was held in the Juvenile Court in which it was determined that petitioner be bound over to the Cuyahoga County Court of Common Pleas to be tried as an adult in accordance with then current §2151.26, O.R.C. No transcript or stenographic record of any kind of this hearing was ever made, the sole documentation of the proceeding

being a journal entry by the presiding juvenile judge. Following the bindover, the Cuyahoga County Grand Jury indicted petitioner on two counts of first degree murder. To these charges, petitioner initially pled not guilty, but subsequently withdrew this plea and entered a plea of guilty to homocide generally. A three judge panel in Cuyahoga Common Pleas Court, Case No. 76263, accepted the plea, and pursuant to §2945.06, O.R.C. tried the case solely on the issue of degree of culpability. Petitioner was found guilty of first degree murder as to both counts of the indictment, and was sentenced to life imprisonment as to each count, the sentences to be served consecutively. A motion for reconsideration of the sentence was rejected by the court on July 24, 1962, and a motion by the petitioner to vacate and set aside the judgment was similarly denied on June 29, 1970.

On May 17, 1976 petitioner filed with the Cuyahoga County Court of Appeals a *pro se* motion for leave to appeal, together with his affidavit of indigency and a notice of appeal. On June 9, 1976, the Court of Appeals granted petitioner's motion for leave to appeal, and ordered that petitioner be permitted to proceed *in forma pauperis* with the assistance of appointed counsel. In appealing his 1962 conviction, petitioner assigned two errors.

The first assignment alleged that the proceedings before the Juvenile Court served to place petitioner in jeopardy such that his subsequent conviction by the Cuyahoga Court of Common Pleas constituted double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution. A second assignment of error maintained that the trial court erred in failing to determine whether petitioner's guilty plea was knowingly, intelligently, and voluntarily made. The Court of Appeals rejected both claims, and affirmed petitioner's conviction. *State v. Sims,* Case No. 36495 (Cuyahoga County Court of Appeals, 1977).

Petitioner then appealed to the Supreme Court of Ohio, which dismissed the appeal on April 7, 1978 for failure to state a substantial constitutional question. *State v. Sims,* Case No. 78-140 (Supreme Court of Ohio, 1978).

Petitioner is now before this Court seeking federal habeas corpus relief, reasserting the two claims previously considered and rejected by the Ohio state courts. Respondent denies petitioner is entitled to relief, but does concede that petitioner has exhausted his available state remedies.

Petitioner's first claim for relief is based on the double jeopardy clause of the Fifth Amendment, made applicable to the states by incorporation into the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 794 (1969). More specifically, petitioner relies on the Supreme Court's decision in *Breed v. Jones,* 421 U.S. 519 (1975) wherein the Court found the constitutional guarantee against double jeopardy applicable in the context of juvenile proceedings. In *Breed v. Jones, id.,* the Juvenile Court of Los Angeles County had conducted a hearing prior to bindover in which a finding was made that the juvenile had in fact violated a criminal statute. A unanimous Supreme Court held that jeopardy did attach at this proceeding, which the Court characterized as a "jurisdictional or adjudicatory hearing." *Id.* at 522. Writing for the Court, Chief Justice Burger stated:

> We believe it is simply too late in the day to conclude as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. For it is clear under our cases that determining the relevance of

> constitutional pol ies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew "the 'civil' label-of-convenience which has been attached to juvenile proceedings," . . ., and that "the juvenile process. . .be candidly appraised."

421 U.S. at 529. Under *Breed v. Jones,* the guarantee against double jeopardy bars criminal prosecutions where prior juvenile proceedings have taken place, subjecting the juvenile to possible stigma or deprivation of liberty and resulting in an actual adjudication that the juvenile has in fact committed the criminal act in question. The Court was careful to point out, however, that jeopardy would not attach in the instance where the juvenile proceeding was not adjudicatory in nature.

> [N]othing decided today forecloses States from requiring as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding. [Citations omitted]. The instant case is not one in which the judicial determination was simply a finding of, e.g., probable cause. Rather, it was an adjudication that respondent had violated a criminal statute.

Id. at 538 n. 18.

Under the principles of *Breed v. Jones, id.,* it is necessary for this Court to ascertain the precise nature of the juvenile hearing afforded petitioner on March 27, 1962.The fact that this juvenile proceeding preceded the Supreme Court's decision in *Breed v. Jones, id.,* is of little consequence, as there exists considerable federal authority holding that

Breed v. Jones is to be given retroactive effect. *Holt v. Black,* 550 F. 2d 1061 (6th Cir.), *cert. denied,* 432 U.S. 910 (1977); *See also Jackson v. Justices of Superior Court of Massachusetts,* 549 F. 2d 215 (1st Cir.), *cert. denied,* 430 U.S.975 (1977); *Brenson v. Havener,* 403 F. Supp. 221 (N.D. Ohio, 1975).

Inquiry concerning the nature of the March 27, 1962 hearing conducted by the Juvenile Court is hindered by the absence of any transcript of the proceeding. As indicated above, however, a journal entry was made following this proceeding, and because of its significance, it is in pertinent part reproduced below.

> "3-27-62
> *TO COURT:* This twenty-seventh day of March, 1962, James Samuel Sims, a minor of about the age of seventeen years, came before the Honorable Albert A. Woldman upon the petition of Charles R. Reynolds alleging that James Samuel Sims is a delinquent child in this: that on or about February 16, 1962, at 4502 St. Clair Avenue, Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon, to wit, a pistol, rob from the person of one, Dorothy Kulas, cash in the approximate amount of $1069.00, contrary to the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 18, 1962, at 3005 Woodhill Road, Cleveland, Ohio, he did unlawfully, purposely and while in the perpetration of a robbery, kill one, William C. Beasley, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 23, 1962 at 6938 Kinsman Road,

> Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon, to wit, a pistol, rob from the person of one, David Warren, cash in the approximate amount of $104.50, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. It appearing to the Court that said child has committed acts which, if committed by an adult, would be felonies a mental and physical examination as provided by statute, it is hereby ordered that pursuant to Section 2151.26 Ohio Revised Code the said James Samuel Sims be bound over to the Court of Common Pleas of Cuyahoga County, for further proceedings according to law. It is ordered that said James Samuel Sims be, and he hereby is, committed to the Jail of Cuyahoga County."

Review of the journal entry lends little support to petitioner's contention that the juvenile proceeding at issue was of an adjudicatory character. Absent from the entry is any specific finding that petitioner did in fact commit any of the criminal acts alleged in the juvenile proceeding. Similarly, there is lacking any recitation of evidence upon which an adjudication could be fairly based. The presiding judge made no specific factual findings, but merely indicated that it *appeared* to the court that petitioner had committed felonious acts. This language, coupled with the absence of any express findings, indicates that the juvenile hearing afforded petitioner was not adjudicatory in nature, but was rather similar to a probable cause determination. Given that the burden generally rests on the petitioner in habeas corpus proceedings, *Swain v. Alabama,* 380 U.S. 202 (1965) this Court cannot conclude from the face of the journal entry that petitioner was subjected to an adjudicatory hearing upon

which jeopardy would attach under the principles of *Breed v. Jones, supra.*

Petitioner argues further, however, that the March 27th journal entry must be construed in light of the then existing statutory provisions governing the transfer of juveniles to adult courts. Petitioner points out that the bindover order contained in the journal entry purports to be issued pursuant to §2151.26, O.R.C. Petitioner maintains that compliance with said section, both as it was in effect in 1962 and as *subsequently* construed by the Ohio Supreme Court, would have required that petitioner be formally adjudged delinquent before being bound over to be tried as an adult.

At the time of the juvenile proceedings afforded petitioner in this case §2151.26, O.R.C. provided:

> Child charged with felony.
>
> In *any case involving a delinquent child* under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the Bureau of Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case. (emphasis added).

In 1969, the Supreme Court of Ohio construed §2151.26, O.R.C., to require a finding of delinquency as a condition precedent to bindover. *In Re Jackson,* 21 Ohio St. 2d 215 (1969). Petitioner maintains this statutory requirement, arguably discernible from the face of the statute even prior to *In Re Jackson, id.,* lends support to his conclusion that the juvenile proceeding afforded him in the instant case was of an adjudicatory character such that jeopardy did attach. Implicit in petitioner's argument is the assumption that the juvenile judge did in fact act in conformity with the governing statutory law.

Reliance upon such an assumption in this instance would appear misplaced. Petitioner's contention tends to overlook the fact that the proper operation and construction of §2151.26, O.R.C., were largely unsettled prior to the clarification provided in *In Re Jackson, id.* It appears that prior to this decision, many juvenile courts bound over only on a determination of probable cause. *See Brenson v. Havener, supra* at 225. Given the uncertainty of the law surrounding §2151.26, O.R.C., prior to *In Re Jackson, supra,* this Court cannot assume that an adjudication of delinquency was made in the juvenile proceeding afforded petitioner on March 27,1962, held some seven years before *In Re Jackson, id.,* was decided. The pre-*In Re Jackson* practice of binding over on a probable cause determination, coupled with the absence of any specific factual findings indicative of an adjudication, discussed *infra,* strongly suggest that petitioner's juvenile hearing was of a non-adjudicatory nature.

This Court concludes then that petitioner has failed to sustain his burden of establishing that the juvenile proceeding afforded him was of an adjudicatory nature such that jeopardy would attach. Accordingly, no violation of *Breed v. Jones, supra,* has been demonstrated, and petitioner's first ground for habeas corpus relief must be rejected.

In addition to his double jeopardy claim, petitioner seeks habeas corpus relief pursuant to 28 U.S.C. §2254 based on the alleged failure of the trial court to adequately determine whether petitioner's guilty plea was knowingly, intelligently, and voluntarily made.

It has long been recognized that a plea of guilty must be knowingly and voluntarily made in order to be consititutional. *Kercheval v. United States,* 274 U.S.220 (1927). This is the case because the plea of guilty constitutes not only an admission of the acts charged but also a waiver of several federal constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Boykin v. Alabama,* 395 U.S. 238 (1969). Waivers of such fundamental constitutional rights "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences". *Brady v. United States,* 397 U.S. 742, 749 (1970). Where a guilty plea is "not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void". *McCarthy v. United States,* 394 U.S. 459, 466 (1969). The validity of a plea is to be determined "only by considering all of the relevant circumstances surrounding it" *Brady v. United States,* 397 U.S. at 750.

Petitioner in support of his claim advances the following proposition of law:

> A plea of guilty to homicide generally made by a 17 year old defendant cannot stand as a valid waiver of his constitutional rights under United States Const. Amend. VII and XIV, where that plea was entered by defendant's counsel, without defendant ever having stated one word as to whether the plea was a knowing, voluntary, and intelligent waiver of those rights. Petitioner's brief, p. 12.

Petitioner's argument is based on the following colloquy:

> Now, Mr. Sims, will you stand up, please?
>
> Your attorney, Mr. Norman S. Minor, has just indicated to the Court that it is your desire to enter a plea of guilty to this indictment.
>
> Now, the Court must explain to you first that you are entitled to a jury trial under the Constitution of Ohio, and, secondly, that you are pleading guilty to a charge of first degree murder and that charge under the law of Ohio is a felony and carries with it a possible penalty of death in the electric chair or if mercy is recommended by the Court, to imprisonment for life in the penitentiary.
>
> Now, do you understand that?
>
> MR. MINOR: Judge, I wonder if we might approach the bench for a minute?
>
> JUDGE CORRIGAN: Yes.
>
> (Conference at the bench.)
>
> MR. MINOR: We are ready whenever the Court is ready.
>
> JUDGE CORRIGAN: Yes, sir, Mr. Minor.
>
> MR. MINOR: If the Court is ready to receive the plea now, our plea is guilty to homicide generally, Your Honor.
>
> JUDGE CORRIGAN: And the defendant understands that this is felony and it is up to the Court to determine the degree of the crime?
>
> MR. MINOR: Yes, Judge.
>
> JUDGE CORRIGAN: And he understands the punishments in connection with the various degrees of the crime?
>
> MR. MINOR: I'm quite sure he does.
>
> JUDGE CORRIGAN: All right, then. All right, the Court will accept the plea of guilty from the defendant James Sims.

The primary thrust of petitioner's claim is that the trial court violated petitioner's constitutional rights by the court's willingness to rely upon the assurances of Mr. Minor, petitioner's counsel, to the exclusion of any personal inquiry of petitioner respecting the voluntariness of his plea. Petitioner does not allege he was in fact unaware of his rights or that he was without a full understanding of the charge and its possible consequences. Rather, the gravamen of petitioner's claim is simply that the court failed to conduct a personal inquiry of petitioner to ascertain whether this was the case. No contention is advanced by petitioner suggesting his counsel failed to explain fully the ramifications of petitioner's plea or that counsel's advice was otherwise incompetent. Similarly, there is no allegation that petitioner was victimized by the slightest coercion, deception, or intimidation in connection with his plea.

The Court finds the petitioner's heavy reliance on the absence of personal inquiry of petitioner to be without merit. While personal inquiry of the accused currently represents the better practice and is now required in federal courts under Rule 11, Fed. R. Crim. P., there exists little authority suggesting that such personal inquiry was constitutionally mandated at the time of the plea entered in the instant case in 1962. Indeed, considerable authority exists holding otherwise. In *Dean v. State of North Carolina,* 269 F. Supp. 986, 990 (M.D.N.C. 1967) the district court held that "[t]he fact that the trial judge failed to make adequate inquiry as to the voluntariness of the changed plea was freely and voluntarily entered." Similarly, the Third Circuit has held:

> It is true that the state record discloses that the trial judge made no inquiry of McArthur designed to ascertain as to whether his guilty plea was voluntarily and knowingly made. That factor does not vitiate the plea since the totality of all

surrounding circumstances must be considered in determining the voluntary nature and understanding of the plea.

United States ex rel. McArthur v. Rundle, 402 F. 2d 701, 708 (3rd Cir. 1968). *See also United States ex rel. Darrah v. Brierly,* 415 F. 2d 9, 12 (3rd Cir. 1969).

While it is true the 1969 decision of the Supreme Court in *Boykin v. Alabama, supra,* requires the record to affirmatively show that a guilty plea is voluntary and intelligent, it is extremely doubtful whether this requirement is deserving of retroactive application so as to govern the plea in this case. While the Supreme Court has expressly reserved decision on the retroactivity issue, *Brady v. United States, id.,* 397 U.S. at 748 n. 4, the Sixth Circuit has specifically held that *Boykin* should not be afforded retroactive application. *See Lawrence v. Russell,* 430 F. 2d 718 (6th Cir. 1970) *cert. denied* 401 U.S. 920 (1971); *Scranton v. Whealon,* 514 F. 2d 99 (6th Cir. 1975). Other circuits are in accord: *Moss v Craven,* 427 F. 2d 139, 140 (9th Cir. 1970): *Meller v. State of Missouri,* 431 F. 2d 120, 124 (8th Cir. 1970) *cert. denied* 400 U.S. 996 (1971); *United States ex rel. Rogers v. Adams,* 435 F 2d 1372, 1374 (2d Cir. 1970), *cert. denied,* 404 U.S. 834 (1971); *Freeman v. Page,* 443 F. 2d 493 (10th Cir.), *cert. denied,* 404 U.S. 1001 (1971).

Thus for pleas predating *Boykin v. Alabama,* the traditional totality of the circumstances analysis appears appropriate, requiring this Court to consider all of the relevant circumstances surrounding petitioner's plea. Applying this standard, the Court cannot agree that petitioner's plea was constitutionally defective. Examination of the transcript plainly reveals that the trial court addressed petitioner and his counsel at some length, informing petitioner of the nature of the charge, its possible penalty, and of his right to a jury trial. While it is true petitioner never

personally responded to any of the court's inquiries, the representations of petitioner's counsel clearly indicate that petitioner had been fully appraised of the nature of the charge and its potential consequences. In this instance, where there is absolutely no allegation of incompetence on the part of counsel, the trial court was entitled to credit these assurances given by petitioner's counsel. This follows from the fundamental role of counsel in our criminal justice system, as well as from the fact that "attorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'". *Holloway v. Arkansas*, 98 S. Ct. 1173, 1179-80 (1978) *quoting State v. Brazile,* 226 La. 254, 75 So. 2d 856, 860-61. Dicta from the Supreme Court's decision in *Henderson v. Morgan,* 426 U.S. 637, 648 (1976) further supports this view that some reliance by the trial court upon the assurances of counsel is altogether permissible:

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

This Court concludes then that no constitutional violation ensued solely as a result of the trial court's failure to conduct a personal inquiry of petitioner and that the record does not otherwise demonstrate that petitioner's plea was involuntarily made.

Accordingly, petitioner has failed to present grounds upon

which relief pursuant to 28 U.S.C. §2254 can be granted. The Petition for a Writ of Habeas Corpus is hereby denied.

IT IS SO ORDERED.

/s/ Robert Krupansky
United States District Judge

STATE v. SIMS

55 Ohio App. 2d

The State of Ohio

Appellee,

v.

SIMS,

*Appellant**

[Cite as State v. Sims (1977), 55 Ohio App. 2d 285.]

Criminal law—Double jeopardy—Informal proceedings in Juvenile Court and trial in Common Pleas Court—Constitutional rights not violated, when—No "adjudication" in Juvenile Court—Criminal procedure—Acceptance of guilty plea prior to Crim. R. 11—Response by defendant to court's inquiries not necessary, when—Represented by able counsel.

1. A juvenile defendant is not placed twice in jeopardy where a Juvenile Court has not adjudicated the defendant to be either delinquent or incapable of rehabilitation, but has merely found such defendant to have "committed acts which, if committed by an adult, would be felonies."
2. Informal proceedings conducted in a Juvenile Court in 1962 for the purpose of determining whether or not to bind over a juvenile defendant to be tried as an adult do not constitute an "adjudicatory hearing" as described in *Breed v. Jones* (1975), 421 U.S. 519.

*Reporter's Note: A motion for leave to appeal was overruled by the Supreme Court of Ohio, April 7, 1978.

3. The standard which guided the courts in deciding whether or not to accept a defendant's guilty plea prior to the passage of Crim. R. 11, does not require that a defendant personally respond to each of the court's inquiries where the defendant is represented by able counsel present at the time the plea is offered and accepted.

(No. 36495—Decided December 8, 1977.)

APPEAL: Court of Appeals for Cuyahoga County.

Mr. John T. Corrigan, prosecuting attorney, for appellee.
Mr. Michael C. Hennenberg for appellant.

STILLMAN, J. This case originates from proceedings which took place in the Juvenile Court of Cuyahoga County, Case No. 199-928, on February 27, 1962. A citation and warrant were issued on that date against the appellant, James Sims. On March 27, 1962, following a proceeding in the Juvenile Court, it was determined that the appellant be bound over to the Court of Common Please in accordance with the then current provisions of R.C. 2151.26. On April 11, 1962, the Grand Jury of Cuyahoga County indicted the appellant on two counts of first degree murder. On June 7, 1962, after waiving a jury trial, the appellant and a codefendant appeared before a three judge court in Common Pleas Case No. 76263. Both the appellant and his codefendant entered pleas of guilty and were tried by the judicial panel in accordance with the provisions of R. C. 2945.06.

The trial concluded with the conviction of both defendants on both counts of first degree murder. The court, recommending mercy, sentenced each defendant to life terms on each count to be served consecutively, with the defendants also being ordered to serve in solitary confinement for each

year of their sentences from February 12 through February 23. On July 24, 1962, motions for reconsideration of the sentence were filed by both defendants and were rejected by the court. On June 29, 1970, a motion by the appellant to vacate and set aside the judgment was similarly denied. On May 17, 1976, the appellant filed a *pro se* motion for leave to appeal together with his affidavit of indigency and a notice of appeal to this court. These motions were duly granted and the case is before this court accordingly.

The appellant, James Sims, was 17 years of age at the time of his arrest in 1962. He was charged with the murder of William C. Beasley on February 18, 1962, and was also accused of two armed robberies on February 16 and February 23, 1962. At the proceedings which took place on March 28, 1962, the Juvenile Court bound the appellant over to the Court of Common Pleas. No transcript of the proceedings is available, and it does not appear that any stenographic record was ever made. Following the bind-over and the Grand Jury indictment, the appellant was tried before the Common Pleas Court of Cuyahoga County with appointed counsel defending. The three judge panel consisted of Judges J. J. P. Corrigan, Charles White and Earl Hoover. Mr. Norman Minor, the appellant's counsel, withdrew an earlier "not guilty" plea and entered a plea of "guilty" to homicide generally. The court accepted the "guilty" plea and tried the case on the issue of degree of culpability. The uncontradicted evidence indicated that the appellant had not fired the three fatal shots into the body of William Beasley, but that his codefendant had done so. The appellant's testimony on his own behalf constituted admissions of participation in the crime charged as well as in various offenses introduced under the "Similar Acts Statute," R. C. 2945.59.

The court found both defendants guilty, and it is from this finding that the appellant has appealed, assigning two errors:

"First Assignment of Error:

"The appellant was denied due process of law as the result of having been twice put in jeopardy, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Art. I, § 10 of the Ohio Constitution, and therefore, his conviction in his second trial must be reversed as a matter of law.

"Second Assignment of Error:

"The trial court erred in accepting the appellant's guilty plea without making any determination as to whether such plea was knowingly, intelligently and voluntarily made, in violation of the appellant's rights to a trial by jury and to face his accusers, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. 1, §10 of the Ohio Constitution."

The first assignment of error is based upon the view that the proceedings before the Juvenile Court had placed the appellant in jeopardy and that his subsequent conviction by the Court of Common Please was therefore a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. *Benton v. Maryland* (1969), 395 U.S. 784, 794.

The appellant relies primarily on *Breed v. Jones* (1975), 421 U.S. 519. In *Breed, supra,* the Supreme Court of the United States found that the Juvenile Court of Los Angeles County had conducted a "jurisdictional or adjudicatory hearing" prior to binding the defendant over to be tried as an adult. Testimony was taken from the prosecution's witnesses and the respondent by the Juvenile Court. A "dispositional hearing" was also ordered, and the juvenile was ordered detained for a two week period pending such a subsequent hearing. At the latter hearing, the Juvenile Court indicated its intention to find the juvenile "not amenable to the care, treatment and training program available through the facilities of the Juvenile Courts". The juvenile's counsel

requested a continuance which was granted for one week. Upon the expiration of that period, after considering the report of a probation officer, the court declared the juvenile unfit for treatment as such and ordered that he be prosecuted as an adult. The juvenile was subsequently tried and found guilty of the charges against him.

The language of the United States Supreme Court in finding double jeopardy is illuminating in this case. The court declared at page 529:

"[T]here is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution * * *."

"Jeopardy attached when respondent was 'put to trial before the trier of the facts,' 400 U.S., at 479, 91 S. Ct., at 554, that is, when the Juvenile Court, as the trier of the facts, began to hear evidence. See *Serfass v. United States,* 420 U.S., at 388, 95 S. Ct., at 1062." *Id.*, at 531.

In a significant footnote, the court stated:

"We note that nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding. See *Collins v. Loisel,* 262 U.S. 426, 429, 43 S. Ct. 618, 625, 67 L. Ed. 1062 (1923); *Serfass v. United States,* 420 U.S. 377, 391-392, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975). The instant case is not one in which the judicial determination was simply a finding of, e.g., probable cause. Rather, it was an adjudication that respondent had violated a criminal statue." *Id.*, at 538 n. 18.

Applying the principles enunciated in *Breed, supra,* to the facts of the instant case, we must note that the court docket is our only datum for describing the proceedings which occurred before the Juvenile Court of Cuyahoga County. Because of its significance in this case, we reproduce it in full.

"2-27-62 Petition filed. Citation and warrant issued.

"2-27-62 To Court: This matter came on for hearing this twenty-seventh day of February, 1962, before the Honorable Albert A. Woldman upon the application of Cleveland Police Department, the Court being fully advised of the circumstances, permission is granted to the Cleveland Police Department to finger print and photograph the minor herein in accordance with the provision of Section 2151.31 Ohio Revised Code within the next ten (10) days.

"2-28-62 Warrant returned and filed.

"3-19-62 Citation returned and filed.

"3-27-62 To Court: This twenty-seventh day of March, 1962, James Samuel Sims, a minor of about the age of seventeen, came before the Honorable Albert A. Woldman upon the petition of Charles R. Reynolds alleging that James Samuel Sims is a delinquent child in this: that on or about February 16, 1962, at 4502 St. Clair Avenue, Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon, to wit, a pistol, rob from the person of one, Dorothy Kulas, cash in the approximate amount of $1069.00, contrary to the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 18, 1962, at 3005 Woodhill Road, Cleveland, Ohio, he did unlawfully, purposely and while in the perpetration of a robbery, kill one, William C. Beasley, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 23, 1962, at 6938 Kinsman Road, Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon, to wit, a pistol, rob from the person of one, David Warren, cash in the approximate amount of $104.50, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. It appearing to the Court that said child has

committed acts which, if committed by an adult, would be felonies a mental and physical examination having been made by duly qualified persons, as provided by statute, it is hereby ordered that pursuant to Section 2151.26 Ohio Revised Code the said James Samuel Sims be bound over to the Court of Common Pleas of Cuyahoga County, for further proceedings according to law. It is ordered that said James Samuel Sims be, and he hereby is, committed to the Jail of Cuyahoga County."

This docket demonstrates that the appellant came before the Juvenile Court upon a petition alleging that the appellant was delinquent, and further alleging the particulars of the charges filed against him. The court determined that there was an appearance of acts which would have been felonies if committed by an adult, and in accordance with the provisions of R.C. 2151.26, bound the appellant over to the Court of Common Pleas for further proceedings, committing the appellant to jail.

There is nowhere any indication that an "adjudicatory hearing or a jurisdictional hearing" was conducted on this occasion. There is no finding of delinquency, and there is no recitation of any evidence upon which such an adjudication could be premised. All that appears to have occurred is that the Juvenile Court arrived at a determination that there was an appearance of possible criminal action which properly and appropriately should be considered by the Court of Common Pleas of Cuyahoga County.

Counsel for the appellant has argued that R.C. 2151.26 required a *"finding* of delinquency" to substantiate a bindover to the Common Pleas Court. (Emphasis added.) There is no such specific finding in the transcript of this docket. Although our contemporary terminology of "probable cause" is not recited in the transcript of this proceeding, it is clear from the context that the court determined this probability, and only this probability, at the

proceedings of March 27, 1962.

The appellant cites *In Re Jackson* (1970), 21 Ohio St. 2d 215, to fortify his contention of double jeopardy. This case dealt with the propriety of binding a 16 year old child over to the Court of Common Pleas in 1968. The court determined that the failure of the Juvenile Court to find delinquency or capacity for rehabilitation prevented a bind-over to the Court of Common Pleas. The syllabus of this case recites:

"1. Pursuant to Section 2151.26, Revised Code, as it existed immediately prior to November 19, 1969, where a juvenile was charged with being a delinquent child, and where the Juvenile Court sought to bind that child over to the Court of Common Pleas, the child must first have been found to be a delinquent child; and, if so found, the Juvenile Court must also have found that the child could not be rehabilitated within the exercise of the exclusive jurisdiction of the Juvenile Court.

"2. Pursuant to Section 2151.26, Revised Code, as it existed immediately prior to November 19, 1969, where the evidence before a Juvenile Court was sufficient to support a finding that there was probable cause to believe a delinquent child had committed an act which could be a felony if committed by an adult, that court could properly bind the child over to the Court of Common Pleas."

It is significant in the *Jackson, supra,* case that the Juvenile Court record demonstrates an adjudicatory hearing with testimony presented to the court like that proscribed in *Breed v. Jones, supra.* There is no indication that such a hearing occurred in the instant case.

In the absence of any indication to the contrary, the proceedings of a court are presumed to be valid and regular. *State v. Ray* (1956), 102 Ohio App. 395. The Juvenile Court did nothing to place the appellant in any measure of jeopardy by reason of its conduct in this case. For this reason, we reject the first assignment of error.

The second assignment of error maintains that the trial court failed to determine whether the defendant's guilty plea was knowingly, intelligently and voluntarily made.

It must be borne in mind that the proceedings in this case antedate current criminal rules relating to the acceptance of a guilty plea. The Ohio rule as stated in *State v. Piacella* (1971), 27 Ohio St. 2d 92, 96, indicates that a guilty plea has been voluntarily and intelligently made when the record clearly discloses that:

"(1) a guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) his advice was competent in light of the circumstances surrounding the plea; (4) the plea was made with the understanding of the nature of the charges; and, (5) the plea was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both.***"

Here the appellant was represented by experienced counsel and was being tried by a three judge court. There can be no doubt that his plea of guilty was entered with full knowledge of the consequences and was voluntarily made. The court addressed the appellant directly and at length and his counsel offered responses indicating that he had held conferences with the appellant and that the appellant had a clear understanding of the proceedings.

There is nothing in the record which substantiates an argument that the appellant was unaware of his rights. Although he did not himself respond in any audible fashion to the questions and statements directed to him by the court, he was specifically addressed in the following colloquy:

"Judge Corrigan: Mr. Minor.

"Mr. Minor: If the Court please, with reference to defendant Sims, he has hitherto entered a plea of not guilty to the indictment.

"At this time, with the Court's permission, we should like

to withdraw that plea of not guilty and plead guilty to homicide generally.

"Judge Corrigan: That is a plea of guilty to the indictment?

"Mr. Minor: To homocide generally under the section which provides that a Court shall hear and determine the degree of homicide it is.

"Judge Corrigan: Yes, that is a plea of guilty to the indictment specifically.

"Mr. Minor: With all the included offenses.

"Judge Corrigan: Yes, all right.

"Now, Mr. Sims, will you stand up, please?

"Your attorney, Mr. Norman S. Minor, has just indicated to the Court that it is your desire to enter a plea of guilty to this indictment.

"Now, the Court must explain to you first that you are entitled to a jury trial under the Constitution of Ohio, and, secondly, that you are pleading guilty to a charge of first degree murder and that charge under the law of Ohio is a felony and carries with it a possible penalty of death in the electric chair or if mercy is recommended by the Court, to imprisonment for life in the penitentiary.

"Now, do you understnad that?

"Mr. Minor: Judge, I wonder if we might approach the bench for a minute?

"Judge Corrigan: Yes.

"(Conference at the bench.)

"Mr. Minor: We are ready whenever the Court is ready.

"Judge Corrigan: Yes, sir, Mr. Minor.

"Mr. Minor: If the Court is ready to receive the plea now, our plea is guilty to homicide generally, Your Honor.

"Judge Corrigan: All right. That is under 2945.06.

"Mr. Minor: Yes, Judge.

"Judge Corrigan: And the defendant understands that that is a felony and it is up to the Court to determine the degree of the crime?

"Yes, Judge.

"Judge Corrigan: And he understands the punishments in connection with the various degrees of the crime?

"Mr. Minor: I'm quite sure he does.

"Judge Corrigan: All right, then. All right, the Court will accept the plea of guilty from the defendant James Sims."

In *State v. Stone* (1975), 43 Ohio St. 2d 163, the Supreme Court of Ohio declared:

"A defendant's plea of guilty in a felony case, before July 1, 1973, was voluntarily, knowingly and intelligently made where the record affirmatively discloses that defendant was advised of the rights he was waiving by competent, privately retained counsel and, in part, by the trial court; that he understood the rights he was waiving, which fact was ascertained by the trial court in a personal inquiry of the defendant; and that he was motivated to do so by a desire to avoid a more severe penalty."

For these reasons, we reject the second assignment of error. The conviction of the appellant is therefore affirmed.

Judgment affirmed.

KRUPANSKY, J., concurs.

DAY, C. J., dissents.

Day, C. J., dissenting. A petition was lodged against Defendant-Appellant James Sims (defendant) on February 27, 1962, in Juvenile Court. The defendant was seventeen. The petition alleged two instances of armed robbery and one instance of murder while in the perpetration of a robbery. A citation and warrant issued. On March 27, 1962, the defendant appeared before Juvenile Court for hearing on the petititon. Defendant was bound over to the Court of Common Pleas for trial as an adult.

Defendant was subsequently indicted on two counts of first degree murder. Both counts named the same victim. One count charged murder with "premeditated malice"; the other

charged murder while in the perpetration of a robbery.

On June 7, 1962, defendant plead guilty to both counts of first degree murder, and opted for further proceedings under former R.C. 2945.06, which provided in relevant part:

"* * *Jurisdiction of judge when jury trial is waived; three-judge court.* * *"* * *

"* * *If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pronounce sentence accordingly.[1] In rendering judgment of conviction of an offense punishable by death upon plea of guilty * * *the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury* * *."

The panel of judges found defendant guilty of murder in the first degree on both counts and recommended mercy as to both. The sentences, to be served consecutively, were for life with twelve days of each year ordered spent in solitary confinement.

Defendant filed a late appeal by leave of court. He assigned two errors. My view of the correct disposition of Assignment No. 1 makes it unnecessary to consider the second assignment. I would find No. 1 well taken and would reverse the judgment and discharge defendant.

Assignment of Error No. 1:

"The appellant was denied due process of law as the result of having been twice put in jeopardy, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Art. 1, §10 of the Ohio Constitution, and therefore, his conviction in his second trial must be reversed as a matter of law."

---

[1]Despite a defendant's plea to first degree murder the court could find the offense to be of lower degree.

The prohibition against double jeopardy in the Fifth Amendment to the United States Constitution was held applicable to state prosecutions in 1969, *Benton v. Maryland* (1969), 395 U.S. 784, 794.

More recently, the United States Supreme Court has held that jeopardy attaches at juvenile court adjudicatory hearings, *Breed v. Jones* (1975), 421 U.S. 519, 531. As a result the Fifth Amendment prohibition against double jeopardy bars the trial of a juvenile as an adult when the juvenile has been exposed to a juvenile adjudicatory hearing prior to trial as an adult.

Furthermore, jeopardy attaches not with the rendering of judgment by the juvenile judge, but "when the Juvenile Court, as the trier of the facts, [begins] to hear the evidence," *id.*, 421 U.S. at 531. For that reason, the fact that no adjudication ultimately issues from such a hearing, is immaterial. Assuming an adjudicatory hearing is involved, jeopardy begins when the hearing does.[2]

The hearing in the instant case was held pursuant to R.C. 2151.26 (now repealed). Speaking through its journal the Judge said:

"This twenty-seventh day of March, 1962, James Samuel Sims, a minor of about the age of seventeen years, came before the Honorable Albert A. Woldman upon the petition of Charles H. Reynolds alleging that James Sims is a delinquent child in this:"* * *

"It appearing to the Court that said child has committed acts which, if committed by an adult, would be felonies a mental and physical examination having been made by duly qualified persons, as provided by statute, it is hereby ordered that pursuant to Section 2151.26 Ohio Revised Code the said

---

[2]*See State v. Eppinger*, Eighth Appellate District, No. 35489, decided 1977, at 3. "It is not necessary for the juvenile court to enter a judgment which determines whether a defendant is or is not a juvenile delinquent before jeopardy attaches."

James Samuel Sims be bound over to the Court of Common Pleas of Cuyahoga County, for further proceedings according to law."

At the time of decision in 1962, R.C. 2151.26 read:

"* * *Child charged with felony* * *.

"*In any case involving a delinquent* child under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the bureau of juvenile research, or by some other public or private agency, or by a person qualified to make such examination, *may order that such child enter into a recognizance* with good and sufficient surety, subject to the approval of the judge, *for this appearance before the court of common pleas* at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case." (Emphasis supplied.)

The Supreme Court of Ohio has held that R.C. 2151.26 (prior to amendment in 1969) made a finding of delinquency a condition precedent to bindover, *In Re Jackson* (1970), 21 Ohio St. 2d 215, 218.

The trial judge in the instant case must be presumed to have known this statutory requirement. When the instant bindover is considered in this light the court's meaning in its journal is plain. The words "It appearing to the Court that said child has committed acts which, if committed by an adult, would be felonies* * *" followed by a bindover must mean the court has made a finding of delinquency though it is described somewhat ambiguously. Because the court made a finding, it must have taken evidence. Otherwise, what is the source of the "appearing" that persuaded the judge to bindover? I am unwilling to guess that the court acted on

mere allegations. This conclusion is buttressed by the presumption of legality which accompanies judicial rulings unless rebutted. To assume without supporting evidence that the presumption is dissipated is not to rebut the presumption, but to invert it.

Thus, the bindover hearing must be considered more than a probable cause hearing unless the bindover is in violation of the statute. So far, no one has even suggested that.

If these conclusions are correct, the hearing on March 27, 1962, put the defendant in jeopardy. The felony proceeding was the second jeopardy and the instant case fits squarely within *Breed v. Jones.* The only remaining consideration is whether the latter case is retroactive. One might rely on the implications of *Linkletter v. Walker* (1965), 381 U.S. 618, analysis (whether the basic fairness of the trial was affected) or the more positive implication in *Robinson v. Neil* (1973), 409 U.S. 505 (the guarantee against double jeopardy is not directed at a mere procedural defect aimed at some collateral purpose, but rather reaching basic fairness) to find retroactivity. However, the Circuit Court of Appeals for the Sixth Circuit has specifically ruled that *Breed* is retroactive, *Holt v. Black* (1977), 550 F. 2d 1061, 1062, 1065. Because single jeopardy is a basic constitutional right, retroactivity for the *Breed* doctrine is not only appropriate, but required.

Cir

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 80-472

TED ENGLE, Superintendent
Chillicothe Correctional Institute

Petitioner

vs

JAMES SAMUEL SIMS

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, James Samuel Sims, respectfully asks leave to file the attached Brief in Opposition to a Writ of Certiorari to the United States Supreme Court and to proceed in forma pauperis pursuant to Rule 46 of the United States Supreme Court Rules of Procedure.

Said leave to proceed in forma pauperis was sought in the United States District Court for the Northern District of Ohio in Sims v. Engle, Civil Action No. C-78-1302 (1979) and in the United States Court of Appeals for the Sixth Circuit in Sims v. Engle, 619 F.2d 598 (6th Cir. 1980); and Said leave to proceed in forma pauperis being granted in both courts.

Respectfully submitted,

Michael Chaim Hennenberg

MICHAEL CHAIM HENNENBERG)

SERVICE

I hereby certify that a copy of the foregoing was mailed to Richard David Drake, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, this 24th day of November, 1980.

Michael Chaim Hennenberg

Counsel for Respondent

10/

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October Term, 1980

No. 80-472

TED ENGLE, Superintendent
Chillicothe Correctional Institute

Petitioner

v.

JAMES SAMUEL SIMS

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit and order denying rehearing are reported as Sims v. Engle, 619 F.2d 598 (6th Cir. 1980). The decision of the United States District Court for the Northern District of Ohio, Eastern Division is unreported. The decision of the Ohio Court of Appeals for the Eighth Judicial District is reported as State v. Sims, 55 Ohio App. 2d 285 (1977).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on April 17, 1980. Rehearing was denied on June 26, 1980. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment V to the Constitution prohibiting double jeopardy

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

made applicable to the states by Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Ohio Revised Code §2151.26 (as effective in 1962)

Child charged with felony

> In any case involving a delinquent child under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the Bureau of Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case.

Case No. 80-472

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TED ENGLE, Superintendent
Chillicothe Correctional Institute

Petitioner

vs

JAMES SAMUEL SIMS

Respondent

STATEMENT OF THE CASE

Respondent accedes to the Petitioner's Statement of the Case excepting only to the factual misrepresentation made on Page 6 of the Petition for Writ of Certiorari to the effect that this Supreme Court is petitioned to review a decision of the Sixth Circuit Court of Appeals in which the Court of Appeals held "it would be presumed" that a violation of the prohibition against double jeopardy occurred in the prosecutions against the Respondent, James Samuel Sims.

The Sixth Circuit held that absent evidence to the contrary, it must presume that state court proceedings against the Respondent were regular and valid. Finding that there was no evidence produced by the Petitioner to establish that the Juvenile Court proceedings of March 27, 1962 against Respondent under Ohio R.C. §2151.26 deviated from statutory mandate, it held, as a matter of Ohio law, that Respondent was first placed in jeopardy in that 1962 appearance before the Cuyahoga County Juvenile Court and that subsequently Respondent was again placed in jeopardy by further prosecution for the same offense in the Cuyahoga County Court of Common Pleas resulting in his felony conviction and imprisonment.

On these grounds the Court of Appeals found the Respondent's conviction was entered in violation of the Fifth Amendment's prohibition against double jeopardy and remanded to the district court for issuance of the Writ of Habeas Corpus. Sims v. Engle, 619 F.2d 598 (6th Cir. 1980).

ARGUMENT IN SUPPORT OF OPPOSITION OF GRANTING CERTIORARI

The Petitioner, Ohio state prison superintendent, overstates when he characterizes this case as presenting "an important issue of constitutional law." Conspicuous by its absence in Petitioner's brief, however, is any citation whatsoever to any provision of the federal constitution to support the Petitioner's claim that this case warrants review by this Honorable Court. The Petitioner argues "certiorari should be granted in order to resolve this issue of national importance". The dispositive issue in this case is, in fact, the sufficiency of the Respondent's evidence supporting his application for a Writ of Habeas Corpus. Petitioner does not explain how or why this evidentiary question has risen to an issue of national importance.

Petitioner describes the question presented as "regarding the allocation of the burden of proof in a federal habeas corpus proceeding" under 28 U.S.C. §2254, but in truth, there is no dispute in this case. Unquestionably, Respondent, James Samuel Sims, who made application for habeas corpus relief in the federal district court, bore the burden to prove his entitlement to the writ. The Respondent met his burden of proof in the district court and on appeal, the Sixth Circuit Court of Appeals so held and directed the district court to issue the writ.

The Petitioner asks this Honorable Court to review this case because Petitioner disputes that Respondent produced sufficient evidence to warrant relief on Respondent's claim that the multiple proceedings against him violated the prohibition against double jeopardy of the fifth amendment to the United States Constitution.

Petitioner asks in his statement of the question presented for review whether a violation of double jeopardy can be presumed by a federal court entertaining a state prisoner's application for habeas corpus relief. The petitioner's statement of the question presented exposes the Petitioner's fundamental confusion about the role legal presumptions played in this litigation. This case does not involve the use of such an extraordinary presumption as presuming a violation of the prohibition against double jeopardy.

The lower federal court in this case did not take the extraordinary measure of presuming a violation of double jeopardy; rather, it applied the long standing, quite unremarkable rule that absent evidence to the contrary, the regularity of state court proceedings must be presumed.

The Petitioner seems not to understand--or perhaps not to accept--the analysis employed by the Sixth Circuit in arriving at its holding that the record on appeal--the same record before the district court when it denied the writ for habeas relief--was legally sufficient to establish that Respondent James Samuel Sims was twice put to jeopardy for the criminal offenses charged against him. The Petitioner argues that the applicant for federal habeas corpus must bring forth competent evidence to prove his entitlement for relief. The Respondent has no quarrel with that proposition but takes exception to the Petitioner's suggestion that that proof must necessarily take one prescribed form to the exclusion of all other means of proof.

Petitioner puts great emphasis on the fact that no verbatim record or transcript of proceedings of the Respondent's March ,1962 appearance in the Juvenile Court was before the district court or before the Sixth Circuit on appeal. Therefore, the Petitioner reasons, a court

could not conclude that the juvenile court proceedings against Respondent were adjudicatory in nature and hence proceedings in which jeopardy attached. Indeed no transcript was made of the Respondent's Juvenile Court proceedings and consequently it was impossible for Respondent to bring forward a transcript of the Juvenile Court hearing which would disclose the evidence taken and its adjudicatory nature affirmatively upon the record.

The Petitioner would end the analysis at just this point--there is no verbatim transcript of the Juvenile Court proceedings against Respondent affirmatively showing that the hearing was in fact adjudicatory, and without a full transcript the Respondent could not have proved his claim that he was first put in jeopardy in the Juvenile Court and later put in jeopardy in the Common Pleas Court for the same criminal charges. Were the analysis to end at this point, then clearly denial of an individual's constitutional rights would be as simple as denying the accused a court reporter to transcribe the proceedings against him. Courts would be powerless to enforce constitutional rights because it would be impossible during later judicial review to detect their violation! We would have then unwittingly developed an absolute, "no record, no review" rule.

The Sixth Circuit recognized that the fact that no transcript of proceedings was made of Respondent's appearance in the Juvenile Court was not necessarily the end of the analysis. The Sixth Circuit's analysis went on to ask whether the Juvenile Court proceeding could have been adjudicatory? And, since the proceeding in Juvenile Court against Sims was conducted under authority of Ohio R.C. §2151.26, the Sixth Circuit as a matter of state law was compelled to conclude that, indeed, it could

have been an adjudicatory hearing. This conclusion was compelled because R.C. §2151.26, the governing statute, did not statutorily limit the scope of the Juvenile Court's proceedings against the charged juvenile to merely a probable cause determination or a preliminary hearing. And, nothing on the face of the record, in particularly nothing in the Juvenile Court's journal entry of March 27, 1962, announces that in fact only a probable cause or preliminary hearing was had prior to that Court's decision to bind over the child, James Samuel Sims, to the Cuyahoga County Common Pleas Court for indictment on certain felony offenses. Because these proceedings could have been adjudicatory in nature, these proceedings could have been the first of two proceedings in which Sims was placed in jeopardy for the same criminal charges. Breed v. Jones, 421 U.S. 519 (1975).

At this point the Sixth Circuit's analysis implicitly recognizes that there are only two choices--either the court presumes that the Juvenile Court hearing against Sims was adjudicatory, that is, evidence was taken and findings on Sims' delinquency made on the evidence; or, the court presums that the proceedings were limited to a probable cause or preliminary hearing on the delinquency charges lodged against Sims. Because it must necessarily choose between two presumptions of what took place in the absence of a transcript or other complete record affirmatively displaying the true nature of the proceedings, the Sixth Circuit succinctly points out: "What actually occurred at the March 27, 1962 hearing is also insignificant." Sims v. Engle, 619 F.2d at 605.

Looking to applicable state law, the Sixth Circuit had no difficulty determining which of the two presumptions was correct--indeed, compelled as a matter of law. So it is that Respondent respectfully contends that this case involves nothing more than the application of an Ohio statute, R.C. §2151.26, and its unambiguous interpretation by the Supreme Court of Ohio to James Samuel Sim's March 27, 1962 appearance before the Juvenile Court.

The Sixth Circuit held that as a matter of Ohio law, a juvenile court proceeding conducted under R.C. §2151.26 was adjudicatory and therefore Respondent Sims was first placed in jeopardy at his March 27, 1962 Juvenile Court bindover hearing. Federal courts are bound to follow the interpretation of state statutes by the highest court of the State, Wardius v. Oregon, 412 U.S. 470, 477 (1973), and in the appeal below, the Sixth Circuit predicated its decision on the interpretation of Ohio R.C. §2151.26 by the Ohio Supreme Court in In Re Jackson, 21 Ohio St.2d 215 (1970).

In Jackson, the Ohio Supreme Court held that R.C. §2151.26 required juvenile court to first make a finding of delinquency before entering an order to bindover a juvenile to the jurisdiction of the Common Pleas Court for further proceedings:

> We agree...that as conditions precedent to binding over a juvenile to the Court of Common Pleas, the Juvenile Court must find that the child is in fact delinquent...

Id. at 218 (Emphasis added).

Not "probably delinquent", but "in fact delinquent."

The Jackson holding was not formulating new procedure; it followed the analysis delineated in the dissenting opinion to State v. Worden, 162 Ohio St. 493 (1955) (dissenting on other grounds), which maintained that a finding of

delinquency was required prior to bindover:

> Then, under Section 2151.26 provided such juvenile is found to be a delinquent the juvenile judge may order him to appear before the Court of Common Pleas. But, first, the juvenile must be found to be delinquent. And this can only be done after a hearing.

Id. at 598 (emphasis added).

By requiring Ohio juvenile courts in hearings under R.C. §2151.26 to made a factual finding of delinquency as a condition precedent to bindover--and by not limiting these proceedings to probable cause or preliminary hearings, the Ohio Supreme Court in Worden and Jackson in effect mandated juvenile court delinquency hearings in which jeopardy would attach. As a result, subsequent proceedings against the juvenile after his bindover to the Common Pleas Court would, under the principles of Breed v. Jones, supra, violate the constitutional prohibition against double jeopardy.

In Breed v. Jones, this Honorable Court held:

> [Jeopardy attaches]at a proceeding whose object is to determine whether [a juvenile] has committed acts that violate a criminal law.

421 U.S. at 529.

The Sixth Circuit recognized that this was precisely the practical effect of the Ohio Supreme Court's interpretation of R.C. §2151.26 in In Re Jackson:

> Once the Juvenile Court possessing the jurisdiction and power to enter final orders levying a wide range of possible sanctions, began a hearing, jeopardy attached and the appellant possessed the constitutional right to have the Juvenile Court as the original trier of fact determine his fate.

Sims v. Engle, 619 F.2d at 605 (citations omitted). That the Worden and Jackson decisions did not have the benefit of the teachings of this Court in Breed v. Jones

does not convert the adjudicatory, R.C. §2151.26 proceeding against Respondent into a proceeding in which jeopardy did not attach. Due to the nature of the constitutional interest involved, this Court expressly declared Breed v. Jones to have retroactive application. The Breed v. Jones holding unquestionably applies to review of Respondent's 1962 Juvenile Court hearing and resulting Common Pleas Court conviction.

The Petitioner protests the conclusion that Respondent's juvenile Court hearing was adjudicatory claiming that at the time of the Respondent's 1962 bindover proceeding no unified practice existed in the Juvenile Courts of Ohio. In other words Petitioner contends the Sixth Circuit should have questioned whether the Juvenile Court really made the adjudication which R.C. §2151.26 required it to make.

The Sixth Circuit properly answered this contention by noting that in hearing Respondent's application for habeas corpus:

> The district court took no evidence on the existence of a customary practice in the Cuyahoga Juvenile Court divergent from the statutory requirements. The statutory provisions are straight forward and the requirement made clear by the Jackson decision was known before 1962. State v. Wordon, 162 Ohio St. 593 (1955) (dissenting opinion, dissenting on other grounds).

Sims v. Engle, 619 F.2d at 605 n. 10 (emphasis added).

The burden of producing evidence on this claim was squarely on the Petitioner's shoulders but none was brought forward. Accordingly, Respondent had no burden to counter or disprove this claim on which no evidence was introduced in the trial court.

Further, the Sixth Circuit answered, the law does not presume irregularity in court proceedings. Absent evidence to the contrary,

> ...state court proceedings are presumed to be regular and valid, State v. Ray, 102 Ohio App.2d 395, 397, 142 N.E.2d 484 (Ct. App. 1956)....

Id. at 605 n. 10.

Regular and valid proceedings for an Ohio Juvenile Court conducting a hearing under R.C. §2151.26 in 1962 would necessarily include an evidentiary hearing on the issue of whether the child had committed acts which could be a felony if committed by an adult and a finding of delinquency prior to entering an order binding over the child to the jurisdiction of the Common Pleas Court for further prosecution. R.C. §2151.26; In re Jackson, supra.

There is no question that Respondent Sims was bound over to the Common Pleas Court as a result of his Juvenile Court hearing under R.C. §2151.26 and that subsequently he was convicted on the same charges upon which he was previously adjudicated to be a delinquent child.

The Petitioner points to no part of the Juvenile Court's March 27, 1962 Journal Entry--the only surviving record of what occurred that date to the child, James Samuel Sims--as giving any indication of any departure whatsoever by the Cuyahoga County Juvenile Court from the statutory requirements set forth in R.C. §2151.26 or from the interpretation of those statutory requirements in State v. Worden, supra, and In Re Jackson, supra.

Petitioner does question whether the Juvenile Court did in fact find Respondent Sims to be delinquent. This is immaterial. In Swisher v. Brady, 438 U.S. 204 (1978), this Supreme Court held that jeopardy attaches prior to

the final judgment of the court. See also, Arizona v. Washington, 434 U.S. 497, 503 (1978); McGaha v. Tennessee, 461 F. Supp. 360 (E.D. Tenn. 1978) (Where jurisdiction of juvenile court was strictly limited by statute to probable cause hearing, jeopardy did not attach to such proceeding).

Petitioner asks this Court to grant certiorari in this case to speculate on the nature of the March 27, 1962 hearing based on the Juvenile Court's statement in its Journal Entry

> It appearing to the Court that said child had committed acts, which, if committed by an adult would be felonies....

The Sixth Circuit refused to speculate on this statement but in a footnote admitted these words were more indicative of an adjudicatory hearing than a probable cause or preliminary hearing:

> Were we compelled to interpret the Juvenile Court's journal entry order, in particular the phrase "It appearing to the Court that said child has committed an act" we would hold the Juvenile Court did make a finding of fact of Sims' guilt.

Sims v. Engle, 619 F.2d at 605 n. 12.

What else could "it appearing to the court" mean?

It does not surpass Respondent's attention that Petitioner suggests to this Court that the Sixth Circuit erred in refusing to remand this case to the district court with instructions to conduct an evidentiary hearing on the issue of Ohio Juvenile Court practice under R.C. §2151.26 in 1962. Respondent questions the relevancy any determination on that issue would have to the ultimate issue of whether Respondent was placed in jeopardy at the Cuyahoga County Juvenile Court hearing on March 27, 1962. Additionally,

Respondent respectfully submits the Petitioner's request for rehearing and for a remand simply asks for a second chance to prove its defense to Respondent's claim for relief under federal habeas corpus. The Petitioner received his day in court and now wants "a second bite of the apple."

Petitioner even poses an unleashing of the floodgates argument: the Sixth Circuit's holding may result in the release of all juvenile felons bound over for trial under Ohio R.C. §2151.26. Does Petitioner seriously argue that should the State of Ohio violate many persons' fifth amendment rights in the same fashion, this Court should reward the State by denying relief to each individual who raises that violation on application for a Writ of Habeas Corpus?

CONCLUSION

The Respondent respectfully contends that the Sixth Circuit correctly applied settled principles of state and federal law to the facts as it found them in the record to reach the proper decision that jeopardy had, in fact, attached at the March 27, 1962 juvenile court proceedings:

1. The juvenile court bindover proceeding was governed by Ohio R.C. §2151.26.

2. Federal courts follow the interpretation of state legislation by the highest court of the State. Wardius v. Oregon, supra.

3. Ohio R.C. §2151.26 was interpreted by the Ohio Supreme Court to require a finding of delinquency prior to bindover. In Re Jackson, supra; State v. Wordon, supra.

4. Jeopardy attaches at a juvenile court proceeding when the juvenile court is not limited in scope by statute to a preliminary hearing or probable cause hearing and the juvenile court makes findings of fact as to the juvenile's offenses to determine whether said acts would be felonies if the juvenile was an adult. Breed v. Jones, supra; Swisher v. Brady, supra; Arizona v. Washington, supra. The juvenile court on March 27, 1962 was not limited in scope to only conduct preliminary hearing or a probable cause hearing, and moreover made a finding of fact concerning the Respondent's offense prior to bindover.

5. A presumption of regularity attaches to state court proceedings in the absence of evidence to the contrary. State v. Ray, 102 Ohio App.2d 395, 142 N.E. 2d 484 (1956); see also, Beach v. Sweeney, 167 Ohio St. 477 (1958).

6. The petitioner failed to rebut the presumption of regularity.

7. Therefore the Writ of Habeas Corpus must issue.

For all the reasons stated herein, the Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL CHAIM HENNENBERG

JANET R. BURNSIDE
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief in Opposition to Writ of Certiorari have been served on Petitioner, Ted Engle, Superintendent Chillicothe Correctional Institute, by forwarding such copies through the office of the Assistant Attorney General, Richard David Drake, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, this 24th day of November, 1980. I further certify that all parties required to be served have been so served.

MICHAEL CHAIM HENNENBERG
Counsel for Respondent